MOHAMAD NASUHA ABDUL RAZAK v. PP

COURT OF APPEAL, PUTRAJAYA
MOHD ZAWAWI SALLEH JCA
AHMADI ASNAWI JCA
ABDUL KARIM ABDUL JALIL JCA
[CRIMINAL APPEAL NO: W-05(H)-404-09-2017]
15 JANUARY 2019

CRIMINAL PROCEDURE: *Sentence – Appeal against sentence – Terrorism related offences – Principle of proportionality – Pledging of oath of allegiance – Whether serious offence – Whether imprisonment term of 13 years manifestly excessive in absence of acts of violence – Whether sentence to be reduced – Whether act of downloading extremist material showed motivation of terrorism ideology – Whether imprisonment term of four years reasonable – Deposits of money to fund and support terrorist group – Whether accused a willing participant – Whether sentence of ten years imprisonment appropriate – Penal Code, ss. 130J(1)(a), 130JB(1)(a) & 130N(b)*

CRIMINAL PROCEDURE: *Sentencing – Principles – Terrorism related offences – Whether serious crimes – Whether deterrent sentences warranted – Whether severity of penalty should be proportionate to gravity of offence and degree of responsibility of offender – Guidelines – Whether reference could be made to 'Definitive Guideline to Terrorism Offences' by British Sentencing Council in absence of definitive guidelines from Malaysian superior court – Whether levels of criminality differentiated by culpability and harm*

Following information of a man being involved in terrorism activities, a raid was conducted pursuant to which the appellant was arrested and his mobile phone seized. The computer forensics investigator extracted four images from the mobile phone. Upon analysis, the images were confirmed to be associated with Islamic State ('IS'), which had been designated a terrorist organisation by the United Nations and many individual countries. Further investigation by the police revealed that the appellant, using the alias 'Mohd Nasuha di', had joined a Telegram chat group linked to the local militant cell 'Gagak Hitam' and had pledged his allegiance to the IS by taking an oath or bai'ah. The appellant, on the direction of the top Malaysian IS militant, Muhammad Wanndy Mohd Jedi, for funds to help the IS fighters, was found to have deposited a total sum of RM200 into the account belonging to one Bukhori bin Che Noor. Bukhori was charged and convicted for giving financial services by allowing the deposit and transfer of money from his bank account for the benefit of terrorism. The appellant was thus charged with four terrorism related offences, *inter alia*, under ss. 130J(1)(a), 130JB(1)(a) and two charges under s. 130N(b) of the Penal Code. The appellant pleaded guilty to all the four charges and was duly convicted. The appellant was sentenced to: (i) 13 years imprisonment for the first charge;

A (ii) four years imprisonment for the second charge; (iii) ten years imprisonment for the third charge; and (iv) ten years imprisonment for the fourth charge. All the sentences were ordered to run concurrently from the date of the arrest. Aggrieved, the appellant appealed to the court for the reduction of the sentences.

B **Held (allowing appeal in part)**
Per Mohd Zawawi Salleh JCA delivering the judgment of the court:

(1) Terrorism is a distinct category of criminal activity. It has no equal because the commission of such criminal activity would extend beyond an individual act of violence for a personal reason, such as revenge or financial gain. It has the potential, and in many cases, are intended to endanger large sections of the community and cause mass loss of life. The courts viewed the terrorism-related offences as serious crimes and had imposed deferent sentences on the perpetrators of such crimes. (paras 12 & 13)

D **(2)** The sentence must always satisfy the principle of proportionality – that the severity of the penalty should be proportionate to the gravity of the offence committed and the degree of responsibility of the offender. Terrorism related offences under Chapter VIA of the Penal Code cover a broad spectrum of offenders. There are instances where people are merely followers, acolytes or assistants, people who have sympathies for the activities of the organisation, or who are willing to have organisation benefit from fundraising efforts. Although the offences are serious in nature, they should not be treated on equal footing with other heinous acts of terrorism. (paras 14 & 15)

F **(3)** In the absence of definitive guidelines from the Malaysian superior court, reference is made to the 'Definitive Guideline to Terrorism Offences' ('Guideline') published by the British Sentencing Council. According to the Guideline, the levels of criminality are differentiated by (i) culpability; and (ii) harm. The courts must also consider the harm associated with the underlying offence to determine whether it warrants heavier sentence in appropriate cases. The Guideline, though not binding, is very useful because it affords the sentencing judge a greater certainty as to the likely sentence that will be imposed within the defined parameters of the factual and evidential matrix of the case. (paras 16-19)

H **(4)** Although the appellant was not involved directly in any particular violent action, there was no doubt that the offences committed by the appellant were serious in nature. The action of pledging an oath of allegiance constituted passive support to the terrorist group. Passive support may be seemingly harmless but it is an intractable problem than open support for terrorism. Therefore, the appellant's action had crossed

the line between the legitimate expression of his own views and the criminal act of inviting support for an organisation, which was at the material time engaged in appalling acts of terrorism. However, the evidence did not show a specific link between the pledge and any acts of violence. Therefore, the court found that the 13 years' imprisonment imposed in respect of the first charge was manifestly excessive. The sentence was set aside and substituted with an imprisonment term of ten years. (paras 24-26 & 33)

(5) The appellant had downloaded extremist materials and gathered them in his mobile phone. The items were related to a terrorist group which could threaten national security and public order. However, there was no evidence to show that these photographs were part of a planned attack and the evidence only showed that the appellant was motivated by their ideology and was preparing to follow them. Therefore, the sentence of an imprisonment term of four years was reasonable and appropriate. (para 28)

(6) The appellant had deposited a small amount of money at ATMs at different locations over a period of time. It showed that the appellant had followed a systematic plan and executed it meticulously and discreetly, to avoid scrutiny and to prevent potential detection. The cost of a terrorist attack can be modest, but the cost to society is far greater. The appellant was aware that the money that he wired would go to the terrorist group. This was not a case of a vulnerable young person being lured or beguiled into criminal misconduct in which he was not inclined to participate. The appellant was a willing participant and took steps to provide support to the group. Hence, the imprisonment sentence of ten years imposed on the appellant in respect of the third and fourth charges were affirmed. (paras 29-31)

Bahasa Malaysia *Headnotes*

Berikutan maklumat tentang seorang lelaki terlibat dalam aktiviti pengganasan, satu serbuan dibuat menjurus pada penangkapan perayu dan telefon bimbitnya dirampas. Penyiasat forensik komputer mengeluarkan empat gambar daripada telefon bimbit itu. Setelah dianalisa, gambar-gambar itu disahkan mempunyai penglibatan dengan Islamic State ('IS'), yang ditetapkan sebagai organisasi pengganas oleh Bangsa-Bangsa Bersatu dan banyak negara-negara tertentu. Siasatan lanjut polis mendedahkan perayu, menggunakan alias 'Mohd Nasuha di', menyertai kumpulan perbualan aplikasi Telegram yang mempunyai kaitan dengan kumpulan militan tempatan 'Gagak Hitam' dan menyatakan kesetiaan pada IS dengan bersumpah atau berbai'ah. Perayu, atas arahan militan IS tertinggi Malaysia, Muhammad Wanndy Mohd Jedi, untuk dana membantu pengganas IS, didapati telah mendepositkan sejumlah RM200 ke dalam akaun milik

A seorang yang bernama Bukhori bin Che Noor. Bukhori telah dituduh dan disabitkan kerana memberi perkhidmatan kewangan dengan membenarkan pendepositan dan pemindahan wang daripada akaun banknya untuk faedah pengganasan. Perayu oleh itu dituduh atas empat kesalahan berkaitan pengganasan, antara lain, bawah ss. 130J(1)(a), 130JB(1)(a) dan dua B kesalahan bawah s. 130N(b) Kanun Keseksaan. Perayu mengaku bersalah atas keempat-empat pertuduhan dan dengan itu disabitkan sewajarnya. Perayu dijatuhkan hukuman: (i) 13 tahun penjara untuk kesalahan pertama; (ii) empat tahun penjara untuk kesalahan kedua; (iii) sepuluh tahun penjara untuk kesalahan ketiga; dan (iv) sepuluh tahun penjara untuk kesalahan C keempat. Kesemua hukuman diarahkan berjalan serentak dari tarikh tangkapan. Terkilan, perayu merayu kepada mahkamah untuk pengurangan hukuman.

Diputuskan (membenarkan sebahagian rayuan)

Oleh Mohd Zawawi Salleh HMR menyampaikan penghakiman D **mahkamah:**

(1) Pengganasan adalah kategori aktiviti jenayah yang berbeza. Aktiviti pengganasan tiada padanan kerana perlakuan aktiviti jenayah sedemikian akan berlanjut melampaui tindakan ganas seseorang individu atas alasan peribadi, seperti membalas dendam atau keuntungan dari segi kewangan. E Tindakan tersebut mempunyai potensi, dan dalam banyak kes, diniatkan untuk membahayakan kumpulan besar masyarakat dan mengakibatkan kehilangan nyawa secara besar-besaran. Mahkamah menimbangkan kesalahan berkaitan dengan pengganasan sebagai jenayah serius dan menjatuhkan hukuman berupa pencegahan terhadap pelaku-pelaku F jenayah sedemikian.

(2) Hukuman mesti selalu memenuhi prinsip kesamarataan – iaitu kekerasan hukuman mesti sepadan dengan keseriusan kesalahan yang dilakukan dan tahap kebertanggungjawaban pesalah. Kesalahan berkaitan pengganasan bawah Bahagian VIA Kanun Keseksaan G merangkumi lingkungan pesalah-pesalah yang luas. Terdapat keadaan di mana seseorang hanya pengikut atau pembantu, seseorang yang bersimpati dengan aktiviti-aktiviti organisasi tersebut, atau yang sanggup menjadikan organisasi itu menerima faedah daripada usaha mendapatkan sumbangan. Walaupun kesalahan-kesalahan tersebut bersifat serius, H kesalahan itu tidak boleh dianggap sama rata dengan tindakan-tindakan pengganasan yang lebih kejam.

(3) Oleh sebab tiada panduan yang tetap daripada mahkamah tertinggi Malaysia, rujukan dibuat pada 'Definitive Guideline to Terrorism Offences' ('Panduan') yang diterbitkan oleh Badan Penghukuman British I Menurut Panduan tersebut, peringkat jenayah dibezakan oleh (i) kebersalahan; dan (ii) kemudaratan. Mahkamah-mahkamah perlu mempertimbangkan kemudaratan yang berkaitan dengan bentuk

kesalahan untuk menentukan sama ada kesalahan itu mewajarkan hukuman yang lebih berat dalam kes-kes yang sewajarnya. Panduan tersebut, walaupun tidak mengikat, amat berguna kerana ia memberikan hakim yang menjatuhkan hukuman kepastian yang lebih jelas mengenai hukuman yang boleh dijatuhkan dalam batasan jelas matriks fakta dan keterangan kes tersebut.

(4) Walaupun perayu tidak terlibat secara langsung dalam apa-apa tindakan ganas tertentu, tidak diragui bahawa kesalahan-kesalahan yang dilakukan oleh perayu bersifat serius. Tindakan menyatakan sumpah kesetiaan membentuk sokongan pasif pada kumpulan pengganas. Sokongan pasif, walaupun kelihatan tidak berbahaya, tetapi adalah masalah yang sukar dikawal, berbanding sokongan langsung pada pengganas. Oleh itu, tindakan perayu telah merentasi garisan antara ekspresi sah pendapatnya sendiri dan tindakan jenayah mengundang sokongan untuk organisasi yang pada masa material terlibat dalam tindakan-tindakan ngeri pengganas. Walau bagaimanapun, keterangan tidak menunjukkan kaitan spesifik antara sumpah kesetiaan dan apa-apa tindakan keganasan. Oleh itu, mahkamah mendapati hukuman penjara 13 tahun yang dijatuhkan berkaitan dengan pertuduhan pertama nyata berlebihan. Hukuman itu diketepikan dan digantikan dengan tempoh pemenjaraan sepuluh tahun.

(5) Perayu telah memuat turun bahan-bahan berunsur ekstremis dan menyimpannya dalam telefon bimbitnya. Bahan-bahan tersebut berkaitan dengan kumpulan pengganas yang boleh menggugat keselamatan negara dan ketenteraman awam. Walau bagaimanapun, tiada keterangan untuk menunjukkan gambar-gambar tersebut adalah sebahagian serangan yang diatur dan keterangan hanya menunjukkan bahawa perayu didorong oleh ideologi mereka dan bersedia untuk mengikut mereka. Oleh itu, tempoh hukuman penjara empat tahun adalah munasabah dan wajar.

(6) Perayu telah mendepositkan sejumlah kecil wang dalam ATM di beberapa lokasi untuk satu tempoh masa. Ini menunjukkan perayu mematuhi pelan yang teratur dan melaksanakannya dengan teliti dan berhati-hati, untuk mengelak kawalan dan untuk mengelak daripada potensi dikesan. Kos untuk serangan pengganas mungkin kecil, tetapi kesannya pada masyarakat amat besar. Perayu menyedari bahawa wang yang dihantar akan diterima oleh kumpulan pengganas. Ini bukan kes seorang anak muda yang lemah, digoda atau diperdaya ke dalam salah laku jenayah yang tidak mahu disertainya. Perayu adalah ahli yang sanggup dan telah mengambil langkah-langkah untuk memberi sokongan kepada kumpulan itu. Oleh itu, hukuman penjara sepuluh tahun yang dikenakan atas perayu berkaitan dengan pertuduhan ketiga dan keempat disahkan.

Case(s) referred to:

Hoare v. R [1989] 167 CLR 458 ***(refd)***
PP lwn. Anuar Ab Rawi [2016] 1 LNS 946 HC ***(refd)***
PP lwn. Azizi Abdullah [2017] 1 LNS 562 HC ***(refd)***
PP lwn. Bukhori Che Noor (Criminal Case No 45S0-40-03-2017) (Unreported) ***(refd)***
PP v. Bukhori Che Noor (45SO-40-12-2016) (Unreported) ***(refd)***
PP lwn. Imam Wahyudin Karjono & Satu Lagi [2017] 1 LNS 691 HC ***(refd)***
PP v. Kadir Uyung & Anor And Other Appeals [2017] 1 LNS 1403 CA ***(refd)***
PP v. Mohamed Danny Mohamed Jedi [2018] 5 CLJ 692 CA ***(refd)***
PP lwn. Mohd Haniffa Syedul Abbar [2016] 1 LNS 1654 HC ***(refd)***
PP lwn. Muamar Gadaffi Mohamad Shafawi [2017] 1 LNS 516 CA ***(refd)***
PP lwn. Muhammad Hakimin Azman [2017] 1 LNS 1017 HC ***(refd)***
PP v. Muhammad Kasyfullah Kassim [2017] 1 CLJ 63 CA ***(refd)***
PP lwn. Muhammad Sani Mahdi Sahar [2016] 1 LNS 1150 CA ***(refd)***
PP v. Rohaimi Abd Rahim & Anor (Criminal Appeal No: W-05(H)-83-02-2016) (Unreported) ***(refd)***
PP v. Roshelmyzan Husain (45SO-33-12-2016) (Unreported) ***(refd)***
PP lwn. Tengku Shukri Che Engku Hashim [2017] 1 LNS 1763 HC ***(refd)***
PP v. Wan Mohamad Nur Firdaus Abd Wahab (45SO-108-05-2017) (Unreported) ***(refd)***
PP lwn. Zairosfitri Jainudin Azhar (45SO-26-11-2016) (Unreported) ***(refd)***
R v. Khawaja [2010] ONCA 862 ***(refd)***
Siti Noor Aishah Atam lwn. PP [2018] 5 CLJ 44 CA ***(refd)***

For the appellant - In person
For the prosecution - Dhiya Syazwani Izyan Mohd Akhir; DPP

[Editor's note: For the High Court judgment, please see PP lwn. Mohamad Nasuha Abdul Razak [2017] 1 LNS 1420 (overruled in part).]

Reported by S Barathi

JUDGMENT

Mohd Zawawi Salleh JCA:

Introduction

[1] The appellant was charged before the Kuala Lumpur High Court for four terrorism-related offences. The charges read as follows:

> First Charge
>
> Bahawa kamu pad a 30 Mac 2016 jam lebih kurang 8.37 pagi, di Lot 3030, Kampung Sungai Tembak, Parit Panjang, dalam daerah Baling, dalam negeri Kedah, dengan pengetahuan telah memberi sokongan dengan cara berbai'ah kepada kumpulan pengganas Islamic State menggunakan nama "Abu Nazrin" dalam kumpulan aplikasi Telegram "gagak hitam" dengan menggunakan nombor telefon 011-24335218 seperti di lampiran; dan oleh yang demikian kamu telah melakukan suatu kesalahan di bawah perenggan 130J(1)(a) Kanun Keseksaan [Akta 574] yang boleh dihukum di bawah subseksyen 130J(1) Kanun yang sama.

Second Charge

Bahawa kamu pada 30 Mac 2016 jam lebih kurang 8.37 pagi, di Lot 3030, Kampung Sungai Tembak, Parit Panjang, dalam daerah Baling, dalam negeri Kedah, telah ada dalam milikan kamu empat (4) keping gambar di dalam telefon bimbit jenis IPhone 5s (Nombor IMEI: 013986000816301) yang merupakan item berkaitan dengan kumpulan pengganas Islamic State (IS), dan dengan itu kamu telah melakukan suatu kesalahan di bawah perenggan 130JB(1)(a) Kanun Keseksaan [Akta 574] yang boleh dihukum di bawah subseksyen 130JB(1) Kanun yang sama.

Third Charge

Bahawa kamu pada 4 Mei 2016 jam lebih kurang 5.01 petang, di CDM Maybank Petronas, Kuala Ketil, dalam daerah Baling, dalam negeri Kedah, telah secara tidak langsung memberikan wang sebanyak RM100 kepada Bukhori bin Che Noor melalui akaun Maybank bernombor 157166-894675, yang mana kamu mempunyai sebab yang munasabah untuk mempercayai bahawa harta itu akan digunakan, secara keseluruhan atau sebahagian, untuk melakukan perbuatan pengganas, dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah subseksyen 130N(b) Kanun Keseksaan [Akta 574] dan boleh dihukum di bawah peruntukan yang sama.

Fourth Charge

Bahawa kamu pada 29 Jun 2016 jam lebih kurang 1.02 petang, di CDM Maybank Baling 2, dalam daerah Baling, dalam negeri Kedah, telah secara tidak langsung memberikan wang sebanyak RM100 kepada Bukhori bin Che Noor melalui akaun Maybank bernombor 157166-894675, yang mana kamu mempunyai sebab yang munasabah untuk mempercayai bahawa harta itu akan digunakan, secara keseluruhan atau sebahagian, untuk melakukan perbuatan pengganas, dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah subseksyen 130N(b) Kanun Keseksaan [Akta 574] dan boleh dihukum di bawah peruntukan yang sama.

[2] The appellant pleaded guilty to all the four charges and was duly convicted. After having considered the written and oral submissions by the parties, the learned Judicial Commissioner ("JC") sentenced the appellant as follows:

(i) First charge: 13 years imprisonment;

(ii) Second charge: four years imprisonment;

(iii) Third charge: ten years imprisonment;

(iv) Fourth charge: ten years imprisonment; and

(v) The sentences to run concurrently from the date of arrest, 28 September 2016.

[3] Being aggrieved by the said sentences, the appellant appealed to this court urging the reduction of the same.

[4] We have heard the appellant himself and learned Deputy Public Prosecutor ("DPP") at some length. We have also perused the written submissions carefully and gone through the record of appeal in its entirety. For the reasons that follow, we found that there is merit in this appeal in respect of the first charge. We, accordingly, allowed the appeal and set aside the sentence of 13 years imprisonment imposed by the High Court and substituted it with an imprisonment term of ten years with effect from the date of arrest on 28 September 2016. We affirmed the sentences imposed by the High Court in respect of the second, third and fourth charges.

The Factual Background

[5] The police had received information of a man being involved in terrorism activities. On 28 September 2016, Inspector Mohd Fahmi bin Mohamad Termizi led a raiding party to premises at Lot 3030, Kampung Sg. Tembak, Parit Panjang, Baling, Kedah. The appellant was arrested and his mobile phone was seized. Inspector Nur Zahirah binti Mustapha, a computer forensics investigator, extracted four images from the mobile phone. Professor Rohan Kumar Gunaratna, an academic researcher on terrorist groups, analysed the said images and confirmed that they are associated with the Islamic State ("IS"). IS has been designated a terrorist organisation by the United Nations and many individual countries. The United Nations holds IS responsible for human right abuses and war crimes. IS also committed ethnic cleansing on historic scale in Northern Iraq. (See "Ethnic cleansing on a historic scale: The Islamic State's systematic targeting of minorities in Northern Iraq", Amnesty International, 2 September 2014)

[6] Further investigation by the police revealed that the appellant, using the alias "Mohd Nasuha di", had joined a Telegram chat group linked to the local militant cell "Gagak Hitam" (Black Ravens), helmed by IS militant Muhammad Wanndy Mohd Jedi, the top Malaysian IS operative in Syria. On 30 March 2016, at about 8.37am, the appellant had pledged his allegiance to the IS by taking an oath or *bai'ah* as follows:

> Saya Abu Nazrin bersumpah demi Allah tidak akan berkhianat kepada ikhwah anshar daulah islamiyah dimanapun berada, siap menerima azab dari Allah, dan tidak diterima bumi bila saya berkhianat dan saya memberikan informasi penting kepada thaghut berupa identitas, strategi, maupun pergerakan yang sekecil- kecilnya dari perjuangan ini atau apapun yang dapat membahayakan keselamatan anshar daulah lainnya. Bila saya tertangkap atau terancam dibunuh, saya tidak akan memberikan informasi apapun kepada musuh-musuh Allah.
>
> Inilah sumpah saya atas nama Allah SWT, semoga Allah melindungi saya lahir & batin, dunia & akhirat.
>
> Aaamiin Ya Rabal Alamin ...

[7] Ahmad El-Muhammady bin Muhammad Uthman El- Muhammady, a lecturer and researcher from the International Islamic University Malaysia (IIUM), had analysed the said allegiance and confirmed that the oath signifies these:

Bay'ah merupakan sumpah yang dilakukan oleh seseorang untuk memberi kesetiaan dan ketaatan kepada ketua (amir) dan kumpulan. Bay'ah merupakan satu upacara penting bagi seorang pengikut untuk menyertai sesuatu kumpulan. Apabila seseorang itu memberikan bay'ah atau sumpah taat setia kepada seseorang atau kumpulan, maka implikasinya seperti berikut:

(i) Seseorang menjadi ahli bagi kumpulan itu secara rasmi;

(ii) Ahli bersedia memberi kesetiaan (wala) yang mutlak kepada ketua atau kumpulan;

(iii) Bila diberi arahan oleh ketua atau kumpulan, ahli wajib taat atau wajib patuh pada arahan tanpa ragu-ragu (al-taah);

(iv) Sekiranya ahli tidak akur atau melanggar bay'ah, akan gugur keahlian, dianggap durhaka kepada ketua (amir), wajib dihukum. Hukuman ini dilaksanakan oleh kumpulan atau sumpah untuk mendapat hukuman dari Allah di dunia dan akhirat; dan

(v) Sekiranya dia melanggar sumpah (bay'ah), dia akan mendapat balasan di dunia dan di akhirat.

[8] On 2 May 2016, Muhammad Wanndy Mohd Jedi or "Akhi Wanndy" had directed members of the chat group to channel funds to help the IS fighters such as Fudhail Omar and himself. On 4 May 2016 and 29 June 2016, the appellant had deposited a total sum of RM200 into the Maybank account belonging to one Bukhori bin Che Noor. Bukhori was charged and convicted for giving financial services by allowing the deposit and transfer of money from his bank account for the benefit of terrorism (see *PR v. Bukhori bin Che Noor*, Criminal Case No. 45S0-40-03-2017).

Findings Of The High Court

[9] The appellant, in his mitigation, other than narrating his family background such as aged parents, six children and that the youngest is suffering from pneumonia, informed the court that he was influenced to commit the offences by the social media. He was remorseful and promised not to commit the like offences in future.

[10] Learned DPP in his written submission contended that the severity of the offences and the aggravating factors point towards a strong public interest in imposing custodial sentence.

[11] In imposing the sentences as he did, the learned JC reasoned as follows:

[12] Kesalahan di bawah seksyen 130J(1)(a) KK membawa hukuman penjara seumur hidup atau pemenjaraan selama tempoh tidak lebih tiga puluh tahun atau denda. Sementara hukuman di bawah seksyen 130JB(1)(a) KK memperuntukkan hukuman penjara bagi tempoh yang tidak lebih tujuh tahun atau dengan denda. Manakala seksyen 130N(b) KK memperuntukkan hukuman penjara tidak kurang dari tujuh tahun

A tetapi tidak melebihi tiga puluh tahun dan hendaklah juga dikenakan denda. Daripada peruntukan penalti ini merujuk akan serius kesalahan sebegini. Kesalahan yang dilakukan oleh Tertuduh adalah melibatkan diri dengan memberi taat setia kepada kumpulan pengganas dan memberi sokongan serta membantu pergerakan pengganas. Walaupun ia tidak secara langsung melakukan keganasan tetapi perbuatan Tertuduh ini
B menggalak dan menyuburkan pergerakan kumpulan pengganas dan perbuatan pengganas. Islamic State merupakan kumpulan yang telah diisytiharkan sebagai kumpulan pengganas. Justeru itu kesalahan seksyen 130J, 130JB dan 130N KK diperkenalkan bagi tujuan menangani berlaku kes- kes keganasan oleh kumpulan pengganas dan seterusnya
C menghindarkan dari ia menjadi satu ancaman. Malah memasukkan kesalahan-kesalahan ini dalam Undang-undang Keselamatan (SOSMA 2012) adalah bagi maksud menangani kes-kes keganasan yang telah menjadi satu ancaman yang bersifat global itu ...

[13] Dengan itu Mahkamah harus mempertimbangkan kepentingan awam ini melebihi dari kepentingan Tertuduh. Dari tren-tren penghukuman
D yang diputuskan dalam Mahkamah Tinggi Kuala Lumpur dan kes 45SO-67-04/2017, 45SO-[3&7]-01/2017, 45SO-109-05/2017 bagi kesalahan di bawah seksyen 130JB(1)(a) KK hukuman penjara di antara 2-5 tahun dan dalam kes 45SO-1-1/2017, 45SO-40-3/2017 dan 45SO-36- 03/2017 melibatkan kesalahan di bawah seksyen 130J(1)(a) KK hukuman penjara antara 7-10 tahun. Tren-tren ini menunjukkan seriusnya kesalahan-
E kesalahan ini.

[14] Mahkamah ini juga mempertimbangkan faktor-faktor mitigasi tertuduh terutamanya mengenai kesanggupan Tertuduh mengaku salah akan kesalahan dan akan rekod bersih Tertuduh. Namun setelah menimbangkan seriusnya kesalahan yang dilakukan dan kepentingan
F awam, Mahkamah seharusnya memperakui satu hukuman yang berbentuk deterren dan pengajaran ...

Our Findings

[12] It is universally acknowledged that terrorism is a distinct category of
G criminal activity. It has no equal because the commission of such criminal activity would extend beyond an individual act of violence for a personal reason, such as revenge or financial gain. It has the potential and in many cases, are intended to endanger large sections of the community and cause mass loss of life. As the Ontario Court of Appeal stated in *R v. Khawaja* [2010] ONCA 862 at [231]:

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> To be sure, terrorism is a crime unto itself. It has no equal. It does not stop at, nor is it limited to, the senseless destruction of people and property. It is far more insidious in that it attacks our very way of life and seeks to destroy the fundamental values to which we ascribe - values that form the essence of our constitutional democracy.

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[13] These unique features have been recognised by the Malaysian courts. The courts viewed the terrorism-related offences as serious crimes and had imposed deterrent sentences on the perpetrators of such crimes. (See *PP v.*

Muhammad Kasyfullah Kassim [2017] 1 CLJ 63, *PP lwn. Muamar Gadaffi Mohamad Shafawi* [2017] 1 LNS 516, *PP v. Rohaimi Abd Rahim & Anor* (Criminal Appeal No.: W-05(H)-83-02/2016), *PP v. Kadir Uyung & Anor And Other Appeals* [2017] 1 LNS 1403, *PP v. Mohamed Danny Mohamed Jedi* [2018] 5 CLJ 692).

[14] Be that as it may, one of the important factors that we must bear in mind is that the sentence must always satisfy the principle of proportionality - that the severity of the penalty should be proportionate to the gravity of the offence committed and the degree of responsibility of the offender. The principle was articulated by the High Court of Australia in *Hoare v. R* [1989] 167 CLR 458 at 354 as follows:

> a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its objective circumstances.

[15] Terrorism-related offences under Chapter VIA of the Penal Code cover a broad spectrum of offenders. There are instances where people are merely followers, acolytes or assistants, people who have sympathies for the activities of the organisation, or who are willing to have organisation benefit from fundraising efforts. These offences no doubt, are serious in nature. Nonetheless, they should not be treated on equal footing with other heinous acts of terrorism.

[16] The Malaysian superior courts have not come up with clear guidelines on sentencing in respect of these types of offences.

[17] In the absence of definitive guidelines from our courts, it is perhaps useful to make reference to the "Definitive Guideline to Terrorism Offences" ("Guideline") published by the British Sentencing Council. They cover a wide range of terrorism offences including the preparation of terrorist attacks, causing or attempting to cause an explosion, collecting or sharing extremist material, raising funds for terrorism, glorifying terrorist attacks, failing to disclose information about terrorist acts and joining or supporting a banned organisation.

[18] According to the Guideline, the levels of criminality are differentiated by (a) culpability and (b) harm. Briefly, depending on the level of the role the offender played, for example, whether the offender played a leading role in a group activity, he or she could be classified in the category of "high culpability". If the role is lesser, the offender is classified in lower levels of culpability such as "medium culpability" and "lower culpability" with the sentence range diminishing as the level of culpability is reduced. The courts must also consider the harm associated with the underlying offence to determine whether it warrants heavier sentence in appropriate cases. The detail characteristics are reproduced as follows:

Culpability demonstrated by one or more of the following

A - Offender in position of trust, authority or influence and abuses their position.

- Persistent efforts to gain widespread or significant support for organisation.

- Encourages activities intended to cause endangerment to life.

B - Arranged or played a significant part in the arrangement of a meeting/ event aimed at gaining significant support for organisation.

- Intended to gain widespread or significant support for organisation.

- Encourages activities intended to cause widespread serious damage to property, or economic interests or substantial impact upon civic infrastructure.

C - Lesser cases where characteristics for categories A and B are not present.

Harm

The court should consider the factors set out below to determine the level of harm.

1 - Evidence that others have acted on or been assisted by the encouragement to carry out activities endangering life.

2 - Significant support for the organisation gained or likely to be gained.

- Evidence that others have acted on or been assisted by the encouragement to carry out activities not endangering life.

3 - All other cases.

[19] In our view, the Definitive Guideline, though not binding upon our courts, is very useful because it affords the sentencing judge a greater certainty as to the likely sentence that will be imposed within the defined parameters of the factual and evidential matrix of the case.

First Charge

[20] Reverting back to the present appeal, the appellant had participated in *bai'ah*, a ritual in which he swore an oath of allegiance to the IS, promising obedience to the leader of the terrorist group. The oath reflects an agreement and intention to follow directions. The appellant's action of signing on to the IS roster of loyalists shows his strong commitment to aid the IS - professing radical beliefs or joining the radical organisation.

[21] Submissions have been made about the appellant's personal problems. In our considered view, it carries a little weight. No doubt the appellant is responsible in caring his family, and his absence will be difficult to his family, but we must say that the appellant is the author of his own misfortune.

[22] Learned DPP had helpfully brought to our attention the following decisions, in which the accused had been sentenced for the same offences:

Cases

1. *PP v. Zairosfitri Jainudin Azhar* [45SO-26-11-2016]

   The accused pleaded guilty to one count of terrorism-related offences ie, supporting the Islamic State ("IS") by taking an oath of allegiance or *bai'ah.* He was sentenced to five years imprisonment, with effect from the date of arrest.

2. *PP v. Roshelmyzan Husain* [45SO-33-12-2016]

   The accused pleaded guilty to two counts of terrorism-related offences ie, supporting the Islamic State ("IS") by taking an oath of allegiance or *bai'ah* and having in his possession items related to IS. He was sentenced to four years imprisonment for the first charge and two years imprisonment for the second charge.

3. *PP lwn. Imam Wahyudin Karjono & Jonius Ondie & Satu Lagi* [2017] 1 LNS 691

   Both accused pleaded guilty to two counts of terrorism-related offences ie, supporting the Islamic State ("IS") by taking an oath of allegiance or *bai'ah* and hurling of a grenade at the Movida club which injured eight people. They were each sentenced to ten years imprisonment for the first charge and 25 years imprisonment for the second charge.

4. *PP v. Bukhori Che Noor* [45SO-40-12-2016]

   The accused pleaded guilty to two counts of terrorism-related offences ie, supporting the Islamic State ("IS") by taking an oath of allegiance or *bai'ah* and allowing the use of his personal bank account for the benefit of the IS. He was sentenced to seven years imprisonment for each charge.

5. *PP v. Wan Mohamad Nur Firdaus Abd Wahab* [45SO-108-05-2017]

   The accused pleaded guilty to two counts of terrorism-related offences ie, supporting the Islamic State ("IS") by taking an oath of allegiance and having in his possession items related to IS. He was sentenced to eight years imprisonment for the first charge and five years imprisonment for the second charge.

6. *PP v. Tengku Shukri Che Engku Hashim* [2017] 1 LNS 1763

   The accused pleaded guilty on two counts of terrorism-related offences ie, supporting the Islamic State ("IS") by taking an oath of allegiance or *bai'ah* and supporting the use of explosives. He was sentenced to eight years imprisonment for the first charge and three years imprisonment for the second charge.

[23] We have examined the sentences imposed by the courts in the above cases. The sentence in each of those cases is "fact-specific" or "individualisation of punishment", which requires proper consideration of the individual circumstances of each accused person.

[24] In the present appeal, we recognised that the appellant was not involved directly in any particular violent action. However, there is no doubt that the offences committed by the appellant are serious in nature. The action of pledging an oath of allegiance constitutes passive support to the terrorist group. Passive support may be seemingly harmless but it is an intractable problem than open support for terrorism. A terrorist group which has the passive support of many of its followers will be stronger and more determined. Passive support often allows a group to raise funds, acquire arms, plan operations, and enjoy a respite from the counter-attacks of the government it opposes.

[25] Therefore, it is our considered view, that the appellant's action had crossed the line between the legitimate expression of his own views and the criminal act of inviting support for an organisation which was at the material time engaged in appalling acts of terrorism.

[26] As we have alluded to earlier, the evidence in this case did not show specific link between the pledge and any acts of violence. Therefore, with respect, we found that the imprisonment term imposed by the High Court is excessive in light of the circumstances of the case. Consequently, we are mindful to allow the appellant's appeal in respect of the first charge, and substituted it with ten years imprisonment.

Second Charge

[27] In considering whether the sentence imposed upon the appellant in respect of the second charge is excessive or otherwise, we have examined the following decisions, in which the accused had been sentenced for the same offence:

Cases

1. *PP lwn. Muhammad Sani Mahdi Sahar* [2016] 1 LNS 1150

   The accused pleaded guilty to an offence of having in his possession 39 terrorism video recordings. He was sentenced to 18 months imprisonment, with effect from the date of arrest.

2. *PP lwn. Mohd Haniffa Syedul Abbar* [2016] 1 LNS 1654

   The accused pleaded guilty to two counts of terrorism-related offences ie, dealing with terrorist properties and having in his possession 17 photographs relating to the IS. He was sentenced to ten years imprisonment for the first charge and two years imprisonment for the second charge, with effect from the date of arrest. Sentences to run consecutively.

3. *PP lwn. Anuar Ab Rawi* [2016] 1 LNS 946

The accused pleaded guilty to an offence of having in his possession seven photographs and a book relating to the IS. He was sentenced to two years imprisonment, with effect from the date of arrest.

4. *PP lwn. Azizi Abdullah* [2017] 1 LNS 562

The accused pleaded guilty to three counts of terrorism-related offences ie, (i) supporting the commission of terrorist acts, involving the use of explosive material, (ii) having in his possession an IS flag and (iii) having in his possession IS-related photographs and video recordings. He was sentenced to 13 years imprisonment for the first charge and four years imprisonment each for the second and third charge, with effect from the date of arrest. Sentences to run concurrently.

5. *PP lwn. Muhammad Hakimin Azman* [2017] 1 LNS 1017

The accused pleaded guilty to one count of terrorism-related offence ie, having in his possession seven IS-related photographs. He was sentenced to one year imprisonment, with effect from the date of arrest.

6. *Siti Noor Aishah Atam lwn. PP* [2018] 5 CLJ 44

The accused was tried for having in her possession 12 books related to the movement and acts of the IS. The Court of Appeal allowed her appeal and reduced the sentence from five years imprisonment to three years imprisonment, with effect from the date of arrest.

[28] In the present appeal, the appellant had downloaded extremist materials and gathered them in his mobile phone. The photographs were a collection of violent images, designed to incite people in pursuit of violent jihad. These items are related to terrorist group which could threaten national security and public order. We accept that there is no evidence to show that these photographs were part of a planned attack. The evidence only shows that the appellant was motivated by their ideology and was preparing to follow them. For the foregoing reasons, we found that the sentence imposed by the High Court was reasonable and appropriate in the circumstances of the case. We, therefore, affirmed the imprisonment term of four years imposed in respect of the second charge.

Third And Fourth Charge

[29] The appellant had deposited small amount of money at ATMs at different locations over a period of time. It showed that the appellant had followed a systematic plan and executed it meticulously and discreetly, to avoid scrutiny and to prevent potential detection.

[30] Although the amount involved is not large, but every penny is a contribution to serious harm. Much havoc can be wreaked with inexpensive items. The cost of a terrorist attack can be modest, but the cost to society is far greater. The fundraising depends on people like the appellant who are prepared to facilitate the transactions to and from his bank account which benefited the Syria-based militants Fudhail Omar and Muhammad Wanndy. The appellant was aware that the money that he wired would go to the terrorist group. This is not a case of a vulnerable young person being lured or beguiled into criminal misconduct in which he was not inclined to participate. The appellant was a willing participant and took steps to provide support to the group.

[31] On the foregoing reasons, we found that there is no cogent reason for us to disturb the imprisonment sentence of ten years imposed on the appellant in respect of the third and fourth charges.

Conclusion

[32] Whilst we acknowledged that the appellant had no direct involvement with the terrorist group, his actions, however, have a risk of enhancing the abilities of the group. We, therefore, are firmly of the view that the severity of the offences herein outweigh the appellant's plea of guilty.

[33] We found that there are no sufficient justification to disturb the sentences imposed on the appellant for the second, third and fourth charges. However, we found that 13 years of imprisonment imposed in respect of the first charge was manifestly excessive. We, therefore, allowed the appellant's appeal only in respect of the first charge. We, accordingly, set aside the sentence imposed by the High Court in respect of the first charge and substituted it with an imprisonment term of ten years with effect from the date of arrest. So ordered.